Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes	)	MM Docket No. 98-43
	)	
Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities	)	MM Docket No. 94-149

To: The Full Commission

PETITION FOR RECONSIDERATION

Long Island Multimedia, LLC. by its undersigned counsel herewith petitions for reconsideration in part of the Commission's action in the above proceeding, as set forth in its Report and Order (FCC 98-281) in MM Docket No. 98-43 and MM Docket No. 94-149, released November 25, 1998, 63 FR 70039 (December 18, 1998). In support whereof, the following is shown:

I. The Tolling Provisions Should be Revised to Apply Only to Circumstances Beyond the Control of the permittee.

1. In the Notice of Proposed Rulemaking (FCC 98-57), 13 FCC Rcd. 11349 (1998) ("NPR") in this proceeding the Commission proposed to adopt an extended, three year construction term for all newly issued construction permits, which would not be subject to extension and would result in the forfeiture of the permit, if not constructed prior to the expiration of the three year term. Observing that 47 USC 319 precludes forfeiture of a permit due to circumstances beyond permittee's control, the Commission proposed to "toll" the three year term where circumstances beyond the permittee's control prevented construction. NPR at 11373. In proposing these tolling procedures the Commission explicitly indicated that it would "restrict extensions to circumstances where delays are beyond the permittee's control." NPR at 11373. The Commission proposed that the

only circumstances that would warrant such tolling would be the pendancy of administrative or judicial review of the grant of the permit at issue or acts of God, as commonly defined. Id.

2. In its Report and Order in this proceeding ("R&O") the Commission adopted the three year construction period with mandatory forfeiture, as proposed. However, in adopting the tolling provisions, the Commission not only provided for tolling based upon circumstances beyond the permittee's control, but also provided that the construction term would be tolled where "construction is delayed by any cause of action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station." This latter provision imposed no requirement that the cause of action at issue be initiated by a third party or otherwise have resulted from circumstances beyond the control of the applicant.

3. In adopting these provisions the Commission indicated that 47 USC 319 and its rules are intended to assure "a balance between our fundamental interests in expediting new service to the public and preventing the warehousing of scarce spectrum, and our recognition that there are legitimate obstacles that may prevent the rapid construction of broadcast facilities." R&O at para. 90. However, the newly adopted procedures do far less to assure the maintenance of this balance than does the current "one in three" rule inasmuch as they: (a) provide a significantly longer initial construction term and (b) provide for tolling of that significantly longer term on the basis of circumstances which need not be beyond the control of the permittee and which are subject to potential manipulation and abuse by the permittee.

4. The initiation of administrative or judicial review of the grant of a permit by a third party clearly constitutes a circumstance beyond the control of the permittee, as does any bona fide act of God. Likewise, where administrative or judicial review is sought by a third party with regard to a favorable ruling obtained by the permittee with respect to a "necessary local, state or federal requirement", the initiation of the review process also

clearly constitutes a circumstance beyond the control of the permittee. By contrast, administrative or judicial review that is initiated by the permittee with respect to an adverse ruling is not beyond the control of the permittee. It is the failure of the newly adopted tolling provisions to distinguish circumstances within the control of the permittee from those beyond its control that render the newly adopted provisions inimical to the public interest.

5. Where review of an adverse ruling is sought by the permittee, the decision to initiate the review process is entirely within the permittee's control. Furthermore, the adverse ruling giving rise to such action may or may not have resulted from circumstances beyond the control of the permittee. It may be that the permittee has been the victim of arbitrary political action, a circumstance over which it has no control. Equally possible, however, the permittee may have been the victim of its own lack of diligence or foresight. By way of example, a permittee may have lacked diligence in locating or securing access to its transmitter site. It may have encountered delays resulting from its own lack of diligence in securing a modification of its permit or initiating the process for obtaining a needed zoning or environmental approval. It may have lacked diligence in ordering necessary equipment or assuring its ability to meet the credit requirements of creditors. Yet, in implementing the newly adopted tolling provisions the Commission would have no basis for considering any of the permittee's actions or inactions which materially gave rise to the delay. As such the provision for tolling based upon the pendancy of any "cause of action" relating to a "requirement" could well serve to reward the permittee's lack of diligence or foresight. Provided the permittee filed suit in a court of competent jurisdiction, however, the Commission could not question the permittee's own lack of diligence which resulted in the circumstances giving rise to the tolling of the construction term.

6. As the result of its elimination of the important requirement that construction have been delayed by circumstances beyond the permittee's control, what the Commission characterizes as "strict criteria for tolling" are anything

but strict. Furthermore, they will be subject to easy manipulation by permittees. All that is necessary to trigger tolling under the newly adopted procedures is the initiation by the permittee of some cause of action which bears some reasonable relation to some "local, state or federal requirement" affecting construction. Even the least creative permittee should have little difficulty in manufacturing some cause of action to meet this vague standard. Furthermore, having initiated a cause of action, the permittee will have substantial control over the timing of its resolution, with the ability to assure further delay through forum shopping, continuances and other means. The Commission will have no mechanism for policing such abuses, as diligence is no more a factor than is the permittee's control over the process. It is well known that many local courts, as well as the federal district courts, have dockets that will assure that any cause of action so initiated will not come to trial for years. Yet, the Commission, having abandoned any responsibility for assuring that permittees act with diligence to resolve any circumstance giving rise to delay, will have no alternative but to continue tolling the construction term. As such, the tolling provisions are clearly inimical to the public interest and should be modified to assure furtherance of the goal of achieving prompt initiation of new service and avoiding warehousing of spectrum.

7. Not only do the tolling provisions abandon any requirement that the delay result from circumstances beyond the control of the permittee and create an environment ripe for manipulation and abuse, they also lack sufficient specificity to allow permittees to determine in advance what circumstances are sufficient to meet the requirement for tolling. In this regard, neither the rule nor the Commission's Report and Order identify the criteria to be applied, rendering the standard unlawfully vague. As noted above, as modified, Section 73.3598(b) provides that the 3 year construction term may be tolled on the basis of and during the pendancy of any "cause of action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station, including

any zoning or environmental requirement." Nothing on the face of the rule or in the R&O, however, provides any assistance in determining what would constitute a "cause of action" for purposes of the rule nor what would constitute a "necessary local, state or federal requirement for the construction or operation of the station," other than the zoning and environmental permits or approvals explicitly identified. It is unclear whether such "requirements" would be strictly limited to those of a governmental nature or whether they would include nongovernmental matters such as contractual dispute with suppliers, contractors or lessors.

8. As written, neither the rule nor the Commission's R&O provides any clear guidance regarding what would constitute a "cause of action" for purposes of tolling nor how it is to be determined whether or not construction had "been delayed by" the pending cause of action or whether the "requirement" was in fact "necessary." Thus, while it would appear that a factual inquiry would be called for in each case to determine whether or not construction had "been delayed by" the pending "cause of action" and whether the "requirement" was in fact "necessary", the Commission has established no criteria to apply in resolving these questions, and, thus, its decision in each case would be arbitrary. Thus, not only would the initiation and resolution of the "cause of action" be largely within the control of the applicant, the rule is impermissibly vague regarding what would constitute the requisite subject matter of the cause of action so as to qualify for tolling.

9. The Commission's stated (at para. 79) desire to "substantially reduce paperwork burdens on permittees" is insufficient to justify the degradation of the public's interest in the expeditious implementation of new service and avoiding the warehousing of spectrum. While the the expansion of the initial construction term to three years would achieve the goal of reducing administrative and paperwork burdens, the inclusion of vague and easily manipulated tolling provisions exacerbates the problem the new procedures are designed to rectify and seriously undermines the public's interest. Furthermore, the consideration and disposition of claims for tolling will

require precisely the same (if not a greater) degree of "fact-intensive analysis involved in processing and disposing of" permit extension applications which the new procedures are purportedly designed to eliminate. R&O at 79. The Commission goes to great pains to justify the elimination of its current policy of according an additional six months for completion of construction following the modification of a permit or its assignment, yet an additional six months under such circumstances is far less inimical to the public interest than allowing a permittee the opportunity to manufacture and manipulate an openended tolling of the a 3 year construction term. The former is far less likely to impair the goal of expeditious initiation of new service than the latter, which through ease of manipulation could substantially delay the day of reckoning for years, if not decades.

10. Accordingly, Section 73.3598(b)(ii) should be revised to limit circumstances qualifying for tolling to: (a) acts of God and (b) the pendancy of administrative and judicial review initiated by third parties, seeking to overturn or adversely impact: (i) the grant of the permit or (ii) favorable rulings previously obtained by the permittee within the three year term with respect to any other governmental approvals which are necessary and explicitly required by a local, state or federal authority for the construction of the station.

II. The Retroactive Application of the Tolling Provisions is Illogical, Rewards Lack of Diligence and Violates the Prohibition Against Retroactive Application of Legislative Rules.

11. The Commission did not propose to apply the new rules to permits that were "beyond their initial construction periods". NPR at 11374. Likewise, the Commission did not propose to apply the newly adopted tolling provisions retroactively. Id. at 11373-74.

12. In its Report and Order the Commission not only applied the newly adopted procedures to permits outstanding for more than 3 years, but also stated its intention to apply the newly adopted tolling provisions retroactively to previously granted construction and extension terms for the

purpose of determining whether a permittee has enjoyed a three year "unencumbered" construction term. R&O at para. 89. Not only is the retroactive application of the tolling provision illogical, it will have the unwarranted effect of further increasing the already inordinately long construction terms which have been accorded to some permittees, will reward lack of diligence and is impermissibly retroactive.

13. As the Commission observed, a number of permittees have already enjoyed extended construction terms which have greatly exceeded 3 years. Retroactive application of the tolling provisions will have the result in many instances of according those permittees substantially more time than they could have anticipated under the current rules. Furthermore, it will in many instances reward permittee's for lack of diligence, as lack of diligence, whether past or future, will have no adverse impact on a permittee's utilization of the tolling provisions. If their permits have been "encumbered" at any time, the tolling provisions will apply.

14. Not only is retroactive application of the newly adopted tolling provisions illogical and not only does it wrongfully reward lack of diligence, but it is impermissibly retroactive under established precedent. In Chadmoore Communications, Inc. v. FCC, 113 F.3d 235 (D. C. Cir. 1997) the Court held that a newly adopted rule is impermissibly retroactive where it "increases a party's liability for past conduct." Were the Commission's newly adopted tolling provisions to be applied retroactively, they would increase the liability for past conduct of all parties who sought administrative or judicial review with respect to the the grant or extension of a permit, by according the permittee an even longer period of construction than would have been the case, had such review never been sought. The party seeking administrative or judicial review could not reasonably have foreseen at the time such review was sought that such actions would result in this increased liability. Landsgraf v. USI Film Products, 511 U.S. 244, 280 (1994)("the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.") Accordingly, the retroactive application of the tolling

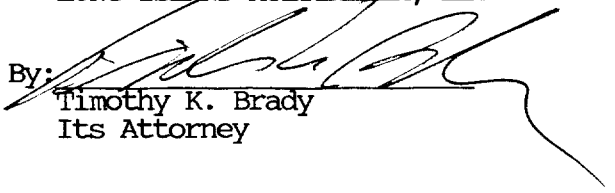
provisions is impermissibly retroactive and, thus, unlawful under established law. Therefore, the Commission should modify its R&O to eliminate retroactive application of the newly adopted tolling provisions and should provide that any permit currently beyond 3 years be forfeited upon expiration of its current extension period.

III. Notification Procedures Should Include Public Notice, Opportunity for Public Comment and Should be Supported by Statements of Fact Given Under Penalty of Perjury.

15. The newly adopted procedures call for submission by applicants of "notification" by letter of circumstances that would warrant tolling the applicable 3 year construction term. As an initial matter, public notice should be required to be given with respect to all notifications filed pursuant to the rule. Likewise, an opportunity for the public to file comments or objections with respect to such notifications. In that regard the Commission has previously recognized its need to rely upon public policing of permittee conduct. Indeed, public input would serve as the only check on the permittee's self-serving claims. Finally, in order to assure that permittees can be held responsible for their representations, the Commission should require that all notifications seeking tolling be supported by statements of fact given under penalty of perjury.

Respectfully Submitted

LONG ISLAND MULTIMEDIA, LLC

By: 
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